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August 30, 2016

**Transmitted Via Electronic Mail**

Utah State Records Committee  
c/o Nova Dubovik  
Executive Secretary  
346 S. Rio Grande  
Salt Lake City, Utah 84101  
ndubovik@utah.gov

**Re: *In re Intuit Data Litigation*, N.D. Cal. Case No. 15-CV-1778-EJD; Notice of Appeal of Denial**

Dear Ms. Dubovik:

Pursuant to the Government Records Access and Management Act ("GRAMA"), UTAH CODE ANN. § 63G-2-403, the undersigned submits this appeal of an access denial.

This matter arises from a request to the Utah State Tax Commission ("USTC") for documents and communications that was submitted by counsel for plaintiffs ("Petitioner") in a putative class action pending in the United States District Court for the Northern District of California. The lawsuit is captioned *In re Intuit Data Litigation*, Master Docket No. 15-CV-1778-EJD (the "Intuit Litigation"). The Intuit Litigation centers around allegations of widespread tax fraud enabled and encouraged by Intuit and its policies. Petitioner seeks documents and communications from the USTC related to the alleged tax fraud that is the basis of the Intuit Litigation.

**I. Statement Of Facts**

On April 18, 2016, Petitioner submitted a request (the "April 18 Request") (attached hereto as Exhibit A) to the USTC. The April 18 Request identified nine distinct requests for documents and communications. After describing the nine categories, the April 18 Request stated explicitly: "These requests are *not* meant to include individual taxpayer returns and we are not seeking any such returns."

The USTC first responded to the April 18 Request on June 8, 2016, in an email (the "June 8 Email"). The June 8 Email stated:

I have research (sic) our records and our emails and cannot locate any

written documentation of our conversation with Intuit/TurboTax. However, our records show that we stopped 206 TurboTax returns that were fraudulent, totaling \$331,414 in erroneous refunds. If you have any additional questions, please contact me at 801-297-3822.

On June 14, 2016, Petitioner called the sender of the email, Disclosure Officer Delores Furniss ("Furniss"). Petitioner explained that the June 8 Email did not address several of the requests in the April 18 Request. Furniss responded that she would conduct a search in response to each of the requests in the April 18 Request and send an updated response.

In a letter signed by Furniss and dated June 22, 2016 (received June 27, 2016), the USTC denied Petitioner's April 18 Request (the "Furniss Denial") (attached hereto as Exhibit B). As the basis for its denial, the USTC asserted without explanation that certain documents sought in the Requests (Items 6, 7, and 9) could not be disclosed because they were: (a) classified as Private; and/or (b) subject to a sharing agreement with the Internal Revenue Service ("IRS").

On July 21, 2016, Petitioner sent a letter to Barry C. Conover ("Mr. Conover"), Executive Director of the USTC. That letter is attached hereto as Exhibit C. In that letter, Petitioner explained that the Furniss Denial failed to comply with GRAMA's statutory requirements in three ways. *First*, the asserted bases for denial were insufficient because they failed to provide "a description of the record or portions of the record to which access was denied" as required under § 63G-2-205(2)(a). *Second*, the bases were insufficient because they failed to provide, as required under § 63G-2-205(2)(b), "citations to the provisions of [the] chapter, court rule or order, another state statute, federal statute, or federal regulation that exempt the record or portions of the record from disclosure." *Third*, the Furniss Denial failed to provide notice of any right to appeal the Furniss Denial, and required by § 63G-2-205(2)(c) and (d).

On August 2, 2016, Mr. Conover sent Petitioner a letter (the "Conover Denial") (attached hereto as Exhibit D) purporting to address the deficiencies of the Furniss Denial. The Conover Denial stated that the "tax returns" requested by Petitioner (Petitioner had expressly stated from the start that it was not requesting any tax returns) are classified as "private" under § 63G-2-302 and "confidential" under § 59-1-403. Mr. Conover enclosed two news releases issued by the USTC, but otherwise denied Petitioner's GRAMA request.

## II. Legal Authority

Section 63-2-205 provides that a notice of denial shall contain:

- (a) a description of the record or portions of the record to which access was denied, provided that the description does not disclose private, controlled, or protected information or information exempt from disclosure under Subsection 63G-2-201(3)(b);
- (b) citations to the provisions of this chapter, court rule or order, another state statute, federal statute, or federal regulation that exempt the record or portions of the record from

disclosure, provided that the citations do not disclose private, controlled, or protected information or information exempt from disclosure under Subsection 63G-2-201(3)(b).

UTAH CODE ANN. § 63G-2-205.

The Furniss Denial failed to comply with these requirements. Items 6 and 7 in the Furniss Denial stated only that the documents requested cannot be disclosed to Petitioner because they are: (a) “‘Private’ under statute and can only be released through our sharing agreement with the IRS and other state taxing authority” (Furniss Denial, Item 6); or (b) “‘protected by our sharing agreement . . . and prohibited from redisclosure to a third party.’” (Furniss Denial, Item 7.) Item 9 in the Furniss Denial stated only that the USTC identified 206 responsive documents, but failed to produce them or provide any basis for withholding them. (Furniss Denial, Item 9.)

The Conover Denial fails to remedy these deficiencies. *First*, the Conover Denial misunderstands the content of what Petitioner has requested. Mr. Conover referred to “tax returns” requested by Petitioner. However, in the original April 18 Request, Petitioner explicitly stated that the GRAMA requests “are *not* meant to include individual taxpayer returns and we are not seeking any such returns.” (April 18 Request, at 3 (emphasis original).) While Mr. Conover indicated that individual tax returns are classified as “private” under § 63G-2-302 and “confidential” under § 59-1-403, Petitioner is not seeking these kinds of documents (as expressly stated in the initial requests). Accordingly, this basis for denial is non-responsive to Petitioner’s GRAMA requests and without merit.

*Second*, the Conover Denial again does not contain a description of the record or portions of the record to which access was denied, as required by § 63G-2-205(2)(a). It is unclear whether this is a result of: (a) the USTC misunderstanding that Petitioner does not seek tax returns; or (b) the USTC failing to perform a diligent search for documents responsive to Petitioner’s GRAMA request. In either case, the USTC has failed to comply with GRAMA’s directive that the USTC provide a description of the documents to which it is denying access. Without such a description, there is no way for Petitioner to meaningfully challenge the USTC’s bases for denying access to the requested documents and information.

*Third*, while the Conover Denial does identify two general statutes as a basis for denying access to responsive records and information, it does not do so with the requisite specificity required by GRAMA. GRAMA requires that a denial shall contain citation to the *provisions* of a statute that exempts records from disclosure. § 63G-2-205(2)(b). The Conover Denial states only that the records requested are “private” under § 63G-2-302. (Conover Denial, at 1.)<sup>1</sup> The cited statute contains *thirty-two* provisions that enumerate specific types of records that are deemed “private.” See § 63G-2-302(1)(a) – (v); § 63G-2-302(2)(a) – (g); § 63G-2-302(3)(a) – (c). The Conover Denial fails to identify which of these specific provisions provide a basis for the “private” classification at issue. This deprives Petitioner of the ability to meaningfully challenge the USTC’s application of the “private” classification under § 63G-2-302.

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<sup>1</sup> The Conover Denial also states that the requested records are “confidential” under § 59-1-403. This statute addresses *tax returns* that are explicitly *not* sought by Petitioner’s GRAMA requests. (See April 18 Request, at 3.)

*Fourth*, although the Conover Denial states that the records sought by Petitioner's GRAMA request is "private", GRAMA provides that the USTC may disclose a record that is private if it determines that the interests favoring access are greater than or equal to the interest favoring restriction of access. § 63G-2-201(5)(b)(ii). The Conover Denial contains no reference or analysis to this provision. Even assuming that any of the records responsive to Petitioner's GRAMA request are classified as "private" under § 63G-2-302, the interests of consumer protection here likely outweigh any interest favoring restricting access to those records. Petitioner has no way to more substantively argue this point, however, because the USTC will not describe the records or identify the specific provision exempting the records from disclosure.

In addition to these failures, we are surprised that USTC's investigation has not yielded any responsive documents to Items 1 through 5 of the April 18 Request. Comments made by a spokesperson for the USTC in the wake of widespread fraudulent filings through TurboTax suggest that the USTC performed at least a perfunctory investigation:

- "Utah tax authorities said in a statement that 'the fraudulent filings originate from data compromised through a third-party commercial tax preparation software process.' The potentially fraudulent returns were all filed through TurboTax, said Charlie Roberts, a spokesman for the Utah State Tax Commission."<sup>2</sup>
- "'We don't know if the fraudster got the information directly from TurboTax, from the cloud, from the cloud provider, or some other means. We just know that our systems weren't compromised,' Mr. Roberts said."<sup>3</sup>
- "The Utah spokesman also said that the recent incidents are 'more than normal identity theft where someone steals a Social Security number and makes up information.' A key difference: 'Fraudsters obtained information that's generally only found on income-tax returns.' In some cases, the fraudulent 2014 returns closely resemble 2013 returns, with only minor alterations—implying that the scammer had access to the taxpayers' 2013 returns."<sup>4</sup>

Items 1 through 5 of the April 18 Request seek documents related to the USTC's investigation of the fraudulent filing activity at the center of the Intuit Litigation and presumably would include communications and other documents related to the bases for the above public statements.

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<sup>2</sup> Laura Sanders, *TurboTax Halts State E-Filing Amid Data-Breach Probe*, Wall St. J. (Feb. 6, 2015), <http://blogs.wsj.com/totalreturn/2015/02/06/turbotax-halts-e-filing-of-state-tax-returns/> (last visited July 21, 2016) (attached hereto as Exhibit E).

<sup>3</sup> *Id.*

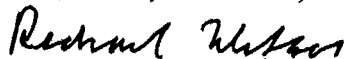
<sup>4</sup> *Id.*

### **III. Relief Sought**

In summary, Petitioner respectfully requests that the Utah State Records Committee direct the USTC to:

- A. Provide Petitioner with a description of the record or portions of the record to which the USTC is denying access, as required by UTAH CODE ANN. § 63G-2-205(2)(a);
- B. Provide Petitioner with the specific provisions of § 63G-2-302 that the USTC relies on to classify responsive documents and information as "private," as required by UTAH CODE ANN. § 63G-2-205(2)(b); and
- C. Diligently search the USTC's records for documents responsive to Items 1 through 5 of the April 18 Request, in light of the USTC's public comments in the wake of widespread fraudulent filings (or confirm that no such documents exist).

Respectfully submitted,



Richard S. Wilson

Enclosures

cc: Utah State Tax Commission  
c/o Barry C. Conover  
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